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No. 94-514

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA,

Petitioner,

vs.

MICHAEL E. GAUDIN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Have recent developments in constitutional case law abrogated the traditional rule that the judge and not the jury determines whether a false statement was material?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In the present case, the Court of Appeals held that a long-standing practice expressly approved by this Court is in conflict with constitutional requirements, even though the practice has coexisted with the underlying principles for well over a century. This creeping constitutionalization of criminal procedure, overturning settled practice with little regard for the

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1. Both parties have consented in writing to the filing of this brief.

consequences, is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Respondent Michael Gaudin was convicted in federal court of equity skimming and making false statements on HUD loan documents. A panel of the Ninth Circuit overturned the false statement conviction on the ground that the trial judge failed to submit to the jury the question of whether those statements were material. *United States* v. *Gaudin*, 997 F. 2d 1267, 1273 (CA9 1993). The Ninth Circuit granted rehearing en banc, 5 F. 3d 374 (1993), and the en banc court came to the same decision. 28 F. 3d 943 (1994).

SUMMARY OF ARGUMENT

This is a case of uncontrolled extrapolation of constitutional rules far beyond the text and history of the Constitution. Such extrapolation, if not curbed, will eventually withdraw the entire field of criminal procedure from democratic control. This area of jurisprudence is in dire need of limiting principles.

One such principle is that a constitutional rule founded on tradition is bounded by tradition. The rule of *In re Winship*, that guilt must be proved beyond a reasonable doubt, is a constitutional rule *because* it is a traditional rule. Any practice that traditionally coexisted with that rule, therefore, does not violate it.

A second limiting principle is that the constitutional right to jury trial is the common law right, and no more. Although an exception was made in *Bloom* v. *Illinois*, regarding criminal contempt, the making of an exception requires particularly compelling circumstances, which are not present in this case.

Sinclair v. *United States*, remains a valid precedent. None of the cases cited by the Court of Appeals to question its validity dealt with the issue of whether the judge or jury decides particular issues at trial. The subsequent extension to the states of

certain rules that have always governed federal trials does not impair a precedent established in a federal case.

ARGUMENT

On the surface, this case is about a seemingly minor question of procedure. Will the materiality of false statements be decided by judges or juries? On a deeper level, though, this case is about much more. It is about the creeping constitutionalization of criminal procedure. It is about courts extrapolating rules from rules from rules further and further away from the text and history of the Constitution. Most disturbing of all, it is about courts doing these things without apparent awareness of the magnitude of what they are doing.

I. Uncontrolled extrapolation of constitutional rules is a great danger, and it requires great caution.

"All rights tend to declare themselves absolute to their logical extreme." *Hudson Water Co.* v. *McCarter*, 209 U. S. 349, 355 (1908) (Holmes, J.). Just as uncontrolled growth of judicially created property and contract rights was a threat to democracy in Justice Holmes' day, so in modern times has uncontrolled growth of constitutionalized criminal procedure rights threatened the people's right of self-government.

Judicial seizure of decisions of policy formerly thought to belong to the people has occasionally come in dramatic leaps. Compare *Mapp* v. *Ohio*, 367 U. S. 643, 655 (1961) (constitutional mandate) with *People* v. *Cahan*, 44 Cal. 2d 434, 442, 282 P. 2d 905, 910 (1955) ("judicially declared rule of evidence," hence subject to legislative revision). More often, though, the shift has come in increments. The process has been one of erosion rather than mudslide.

The process typically begins with a constitutional principle which nearly everyone agrees is good policy, although some may doubt whether it is in the Constitution. Then further steps are said to "follow" from the principle, or to be necessary to "protect" it, or to prevent its "evasion." See, *e.g.*, *Edwards* v. *Arizona*, 451 U. S. 477, 485 (1981) (questioning cut-off rule

lends substance to *Miranda*); *Arizona* v. *Roberson*, 486 U. S. 675, 684 (1988) (extension of *Edwards* to unrelated crimes "follows"); but see *id.*, at 688 (Kennedy, J., dissenting) (consider practical realities).

As far back as 1970, Judge Henry Friendly warned that the ballooning case law had already become "a detailed Code of Criminal Procedure, to which a new chapter is added every year." Friendly, Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments, 38 U. Chi. L. Rev. 142, 156; cf. *Carter* v. *Illinois*, 329 U. S. 173, 175 (1946). Many, many chapters have been added since then, often by successive extrapolation. The danger of such extrapolation has not entirely escaped the notice of this Court:

> "The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth 'logical' extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance." *United States* v. *12 200-Ft. Reels of Film*, 413 U. S. 123, 127 (1973) (footnote omitted).

The Greek mathematician Euclid derived all of geometry from only five postulates. See 1 T. Heath, A History of Greek Mathematics 374 (1981 reprint of 1921 ed.). If the judiciary continues to expand constitutional doctrine into every nook where existing rules could logically lead, then it could similarly derive from the Bill of Rights a complete, comprehensive code, leaving nothing for the people to decide for themselves.

The code so derived might very well be an excellent code, better than any now in force in the states. But the process of democracy is often more important than the result. Having a say in the enactment of laws is an essential part of citizenship. See L. Hand, The Bill of Rights 58 (1958). The progressive decline of democratic control over criminal procedure, as constitutional doctrine crowds out more and more of the field, is a genuine loss to the citizens of this country, regardless of how desirable the rules themselves may be.

This expansion is typically framed by those who favor it as the expansion of the rights of the individual against the govern-

ment. Yet it is equally true that every step in the expansion is a diminution in another essential right: the right of self-government. With each step this Court, a government entity, deprives the individual voter of another piece of that precious right.

> "Any legislature presumably passes a law because it thinks the end result will help more than hinder and will thus further the liberty of the society as a whole. ' The people, through their elected representatives, may of course be wrong in making those determinations, but the right of self-government that our Constitution preserves is just as important as any of the specific individual freedoms preserved in the Bill of Rights. The liberty of government by the people, in my opinion, should never be denied by this Court except when the decision of the people as stated in laws passed by their chosen representatives, conflicts with the express or necessarily implied commands of our Constitution." *In re Winship*, 397 U. S. 358, 385 (1970) (Black, J., dissenting).

The present case does not involve an express legislative choice that elements of offenses traditionally considered to be questions of law would continue to be decided by the trial judge. However, the constitutional basis of the Ninth Circuit's rule would forever take that decision away from both Congress and the state legislatures and vest it instead in an unelected, unaccountable judiciary. Any such diminution in the right of self-government ought to be regarded as a drastic measure requiring compelling justification. The mere fact that the conclusion may seem to follow logically from a statement in a prior case is not enough.

II. *Winship* is premised on tradition and should be limited to tradition.

A. Tradition and Winship.

The rule of *In re Winship*, 397 U. S. 358 (1970) is not based on any of the specific requirements of the Bill of Rights. Instead, it comes under the general requirement of "due process," *id.*, at 364, which the Constitution imposes in identical terms on both the federal and state governments. U. S. Const.,

Amdt. 5; *id.* Amdt. 14, § 1. For this general requirement, Justice Cardozo's classic statement holds true today:

> "The [government] is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice *so rooted in the traditions* and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934) (emphasis added).

There is no significant disagreement that guilt of a crime ought to be proved beyond a reasonable doubt. Indeed, the universality of that agreement was precisely the reason that the constitutional question did not arise for so many years. See *Winship*, 397 U. S., at 372 (Harlan, J., concurring). But agreement alone does not make a constitutional mandate. *Cupp* v. *Naughten*, 414 U. S. 141, 146 (1973). There must be something more. For the *Winship* rule, that something more is tradition.

The *Winship* opinion notes the deep roots of the reasonable doubt standard "from our early years as a Nation." 397 U. S., at 361. The requirement had been assumed to be implicit in constitutional guarantees as far back as 1895. See *id.*, at 362, citing *Davis* v. *United States*, 160 U. S. 469, 488 (1895).

Winship also notes policy reasons for the reasonable doubt standard. 397 U. S., at 363-364. But policy alone, like universal agreement, is no basis for removing an issue from the democratic process. *Spencer* v. *Texas*, 385 U. S. 554, 567-568 (1967). The strong connection between the reasonable doubt standard and preventing the conviction of innocent people serves to distinguish this traditional practice from other traditions which have no such connection and may be abandoned. See, *e.g.*, *Hurtado* v. *California*, 110 U. S. 516, 538, (1884) (state may replace grand jury with preliminary hearing). Tradition remains the foundation for *Winship*'s elevation of the reasonable doubt standard to constitutional stature.

In *Winship* the Court addressed the constitutionality of a variation on the burden of proof unknown to the common law. The use of juvenile court to deal with children who had committed crimes was a turn-of-the-century innovation. See *In re Gault*, 387 U. S. 1, 14-15 (1967). Although the basic approach

of juvenile courts replacing criminal procedures was widely agreed upon, *ibid.*, the burden of proof was not. Courts and legislatures were deeply divided. See *Winship*, 397 U. S., at 360, n. 3 and authorities cited.

Winship thus stands for the proposition that a rule deeply rooted in our tradition and necessary to prevent miscarriages of justice can be a part of the constitutional requirement of due process. Hence, the power of judicial review may restrain legislative innovation which is contrary to tradition. But can a rule founded on tradition be used to chop down tradition as well as conserve it? Can it be used to force change on a state which chooses to retain a traditional practice? The course after *Winship* has been neither straight nor smooth.

B. Mullaney and Patterson.

The *Winship* rule appeared to be cut loose from its historical moorings in *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975). Under Maine law, murder and manslaughter were degrees of the single offense of felonious homicide. The difference between the two degrees was malice. For a hundred years, that element had been presumed upon proof of an intentional killing; defendant had the burden of negating malice by proving "heat of passion on sudden provocation in order to reduce murder to manslaughter." *Id.*, at 688.

Traditional practice in both England and America clearly supported placing some burden on the defendant, although it was not clear whether the general rule was a burden of persuasion or merely a burden of producing evidence. *Id.*, at 693-695, and nn. 16, 20. Imposing the latter burden on the defendant remains common practice to this day. See *id.*, at 701, n. 28; *People* v. *Frye*, 7 Cal. App. 4th 1148, 1154-1155, 10 Cal. Rptr. 2d 217, 220 (1992).

The *Mullaney* Court concluded its historical discussion with two points: that heat of passion was traditionally the main factor determining the degree of homicide, and that the "clear trend" was toward placing the ultimate burden of persuasion on the prosecution. 421 U. S., at 696. Both of these are true, but neither answers the *Winship* question: whether the rule in

question is contrary to the *traditional* burden of proof constitutionalized in *Winship*.

The remainder of the *Mullaney* opinion consists of policy discussion. It discusses the consequences of a finding against the defendant, *id.*, at 698, "societal interests in the reliability of jury verdicts," *id.*, at 699, and difficulties of proof. *Id.*, at 701-702. The Court worried that states might "undermine" *Winship* by redefining separate crimes as degrees of a single offense. *Id.*, at 698. The question of whether Maine had transgressed the tradition which *Winship* found was part of "due process" was not again mentioned.

If *Mullaney* were the last word, one could readily conclude that *Winship* had been entirely detached from the tradition that gave it birth and had become a free-floating principle, a "roving commission" for this Court to reweigh the costs and benefits of assignment of burdens of proof in criminal cases. Cf. *Spencer* v. *Texas*, 385 U. S. 554, 569 (1967) (Stewart, J., concurring). However, a partial correction was not long in coming.

Patterson v. *New York*, 432 U. S. 197 (1977) involved a modern homicide statute which had abandoned the confusing common-law concept of "malice." Instead, intentional killing was defined to be second-degree murder, subject to an affirmative defense of "extreme emotional disturbance." *Id.*, at 198. That defense was only partial, however, because an intentional killer who established it was still guilty of manslaughter. *Id.*, at 199. The burden of proving the defense was on the defendant, by the preponderance of the evidence. *Id.*, at 200.

There were two differences between the New York statute in *Patterson* and the Maine law in *Mullaney*, one practical and one of form. The practical difference, which the Court deemed "relevant to note" was that the New York statutory defense was much broader than the Maine common law concept. *Id.*, at 202. The other difference was that the disturbed mental state was structured as an affirmative defense rather than negating an element of the offense.

If the Court had simply followed the same logical path as *Mullaney*, neither of these differences would have mattered. Indeed, as noted above, the manner in which a state structures the offense was specifically rejected as a criterion by the

Mullaney Court. The fact that a defense is broader than the traditional one makes only a political difference. Permitting states to place the burden on the defendant lowers the political barriers to the creation of new and broader defenses. See *id.*, at 209, and n. 11.

Patterson, however, was not seeking to take advantage of the broader defense. He claimed the quintessential common-law manslaughter. Compare *id.*, at 198 with 4 W. Blackstone, Commentaries 191-192 (1st ed. 1769) (adultery, caught in the act). It would be a curious interpretation of the Constitution to permit a state to raise the burden of proof on a person who falls squarely within the traditional defense, merely in order to extend that defense to other people who would not have qualified for it. Other factors were necessary to the *Patterson* decision.

Foremost among these factors was that following the rationale of *Mullaney* to its logical conclusion would have resulted in a head-on collision with another precedent: *Leland* v. *Oregon*, 343 U. S. 790, 799 (1952) (state may place burden of proving insanity on defendant); see *Patterson*, 432 U. S., at 204-205. The question presented, then, was "not the usual question of whether to follow a constitutional rule, but the question of which constitutional rule to follow . . . ." *Church of Lukumi Babalu Aye* v. *Hialeah*, 124 L. Ed. 2d 472, 517, 113 S. Ct. 2217, 2248 (1993) (Souter, J., concurring in part).

In refusing to extend *Mullaney* to overrule *Leland*, the *Patterson* Court turned back to tradition.

> "It is said that the common-law rule permits a State to punish one as a murderer when it is as likely as not that he acted in the heat of passion or under severe emotional distress and when, if he did, he is guilty only of manslaughter. *But this has always been the case in those jurisdictions adhering to the traditional rule.*" 432 U. S., at 208-209 (emphasis added).

Patterson did not need to overrule the specific holding of *Mullaney*, and it did not do so. *Id.*, at 210. Yet the rationale of *Patterson* left *Mullaney* as little more than a shell, a holding without a rationale. According to the dissent, the majority's "explanation of the *Mullaney* holding bears little resemblance to the basic rationale of that decision." *Id.*, at 222-223 (opinion of

Powell, J.). That is quite true, but it is equally true of *Mullaney*'s complete disregard of tradition as the basis for the *Winship* rule.

C. The Presumption Cases.

Rather than overrule *Mullaney*, *Patterson* distinguished it on the basis of the use of a presumption in that case. *Patterson*, 432 U. S., at 216; cf. *id.*, at 221-222 (Powell, J., dissenting) (criticizing that basis for distinguishing). This disapproval of presumptions of elements soon took on a life of its own, separated from both the tradition basis of *Winship* and the rejected rationale of *Mullaney*.

Sandstrom v. *Montana*, 442 U. S. 510, 513, 524 (1979) disapproved the traditional presumption that a person intends the natural consequences of his voluntary acts. Conspicuous by its absence from the opinion is any discussion of the tradition of this presumption in American courts generally. The only significant historical discussion is of this Court's own cases. See *id.*, at 519, n. 9.[2] Subsequent cases simply relied on *Sandstrom*, without looking further back. See *Francis* v. *Franklin*, 471 U. S. 307, 313-318 (1985); *Yates* v. *Evatt*, 500 U. S. 391, 400-402 (1991).

Thus *Mullaney*, as narrowed by *Patterson* and then amplified within that narrowed channel by *Sandstrom*, has used a rule grounded in tradition to exterminate a traditional practice. The damage in states which used the presumption as a standard jury instruction was enormous, but the wreckage is behind us. The instruction books have been purged, and the cases in which those instructions had been used are resolved.

Regardless of whether the *Sandstrom* rule was really required by the Constitution, the change has been made, it is a desirable one as a matter of policy, and there will be no further damage *if* the constitutional rule is not further extended.

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2. Even this limited discussion was inadequate, for reasons we have previously briefed in this Court. See Brief for the Criminal Justice Legal Foundation as *Amicus Curiae* in *Yates* v. *Evatt*, O. T. 1990, No. 89-7691, pp. 7-9, but the point need not be rehashed here.

D. Holding the Line.

Other than the presumption cases, the decisions of this Court since *Winship* have consistently refused to extend that decision to strike down traditional practices. Although a *per se* rule has not been adopted, the results are consistent with such a rule.

Patterson and the importance of tradition were reaffirmed in *Martin* v. *Ohio*, 480 U. S. 228 (1987).

> "As we noted in *Patterson*, the common-law rule was that affirmative defenses, including self-defense, were matters for the defendant to prove. 'This was the rule when the Fifth Amendment was adopted, *and it was the American rule when the Fourteenth Amendment was ratified.*' [Citation.] Indeed, well into this century, a number of States followed the common-law rule and required a defendant to shoulder the burden of proving that he acted in self-defense." *Id.*, at 235 (emphasis added).

Even though the clear trend was to the contrary, Ohio did not violate the Fourteenth Amendment by choosing to adhere to the practice that was standard when that Amendment was adopted. Compare *id.*, at 236 with *Mullaney*, *supra*, 421 U. S., at 696.

McMillan v. *Pennsylvania*, 477 U. S. 79 (1986) similarly looked to traditional practice. In that case, the legislature had prescribed a mandatory minimum sentence for armed criminals, without increasing the maximum sentence for the crime. Only a preponderance of the evidence was needed for the firearm finding. *Id.*, at 81-82.

Rejecting the *Winship*/*Mullaney* claim, the Court noted that sentencing judges "have traditionally heard evidence and found facts without any prescribed burden of proof at all." *Id.*, at 91. The fact that the legislature prescribed a sentence choice from a fact, rather than leaving the impact of that fact discretionary, made no constitutional difference.

Finally, in *Victor* v. *Nebraska*, 127 L. Ed. 2d 583, 114 S. Ct. 1239 (1994) this Court upheld the traditional definition of reasonable doubt, derived from an 1850 Massachusetts case. See *id.*, at 592, 114 S. Ct., at 1244. The constitutionality of the traditional definition as originally understood was beyond question. The only difficulty was the impact of changes in the

English language on the jurors' understanding of the definition. See *id.*, at 597, 114 S. Ct., at 1248; *id.*, at 601, 114 S. Ct., at 1251 (Kennedy, J., concurring). In contrast, a definition that deviated markedly from the traditional one was summarily struck down in *Cage* v. *Louisiana*, 498 U. S. 39, 41 (1990) (*per curiam*).

E. The Boundary of Winship.

Justice Scalia has advanced the thesis that tradition alone is sufficient to insulate a traditional practice from a general "due process" attack, as opposed to an attack based on a specific requirement of the Bill of Rights or the Equal Protection Clause. See *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 25, 38 (1991) (opinion concurring in the judgment). This *per se* rule has not yet gained the support of a majority, although the traditional practice carries great weight and nearly always prevails. See *id.*, at 17-18 (majority); *id.*, at 40 (Kennedy, J., concurring in the judgment); *Schad* v. *Arizona*, 501 U. S. 624, 642-643 (1991) (plurality); *Medina* v. *California*, 120 L. Ed. 2d 353, 363, 112 S. Ct. 2572, 2577 (1992).

Amicus CJLF's position in the present case is much narrower than Justice Scalia's thesis. We assert only that when a rule's constitutional stature is premised squarely on tradition, as *Winship* is, that the boundary of the constitutional rule extends no farther than the boundary of the traditional rule. Any practice which traditionally coexisted with the rule in question, therefore, is not a violation of the rule.

Acceptance of this principle would provide better guidance to lower courts than the piecemeal approach that has characterized the post-*Winship* cases to date. Cf. *McMillan* v. *Pennsylvania*, 477 U. S. 79, 91 (1986) (noting "inability to lay down any 'bright line' test"). If the *Sandstrom* cases are preserved as a separate body of law under *stare decisis*, regardless of their original correctness, this approach would not significantly diminish protections for the accused, because *Winship* has not been used successfully to attack traditional practice in other cases.

With *Winship* thus limited, legislatures would have a pole star to navigate by as they deal with difficult questions of

burdens of proof, rather than having to guess where the next case will come down in the "differences of degree" between *Mullaney* and *McMillan*. See *McMillan*, *supra*, 477 U. S., at 91. So long as they impose no greater burden on defendant than the common law, they will be safe.

The traditional basis for the determination of materiality by the judge is clear beyond question. The general principle that questions of law are for the court in criminal cases as well as civil was exhaustively discussed by the first Justice Harlan in his opinion for the Court in *Sparf* v. *United States*, 156 U. S. 51, 59-107 (1895). Cases applying this principle to the materiality of false statements are numerous. See, *e.g.*, *United States* v. *Singleton*, 54 F. 488, 489 (DC Ala. 1892); *Carroll* v. *United States*, 16 F. 2d 951, 953 (CA2 1927); *Luse* v. *United States*, 49 F. 2d 241, 245 (CA9 1931); *State* v. *Dineen*, 102 S. W. 480, 482 (Mo. 1907) ("well settled"); *People* v. *Threewit*, 96 N. E. 242, 243 (Ill. 1911) (error to submit question to jury). That should be the end of the *Winship* question.

III. The Sixth Amendment should not be extended to strike down traditional practice without exceptionally compelling justification, not present here.

A. Traditional Practice and the Sixth Amendment.

"As this Court has often recognized, it was not the purpose or effect of § 2 of Article 3, read in the light of the common law, to enlarge the then existing right to a jury trial. The object was to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law and in all cases of a like nature as they might arise in the future, [citation], but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right.

"The Fifth and Sixth Amendments, while guaranteeing the continuance of certain incidents of trial by jury which Article 3, § 2, had left unmentioned, did not enlarge the right to jury trial as it had been established by that Article." *Ex parte Quirin*, 317 U. S. 1, 39 (1942); see also *Parklane Hosiery*

Co. v. *Shore*, 439 U. S. 322, 333 (1979) (civil cases, Seventh Amendment).

This theme resounds throughout this Court's decisions on the constitutional right to jury trial. The several provisions of the Constitution on this subject are "conservative" in the true sense of the word. These provisions were intended to preserve an existing right against future encroachment, in contrast to, for example, the Equal Protection Clause, which worked an affirmative change in the law. See *Holland* v. *Illinois*, 493 U. S. 474, 478-479 (1990) (prohibition of racial discrimination comes from Equal Protection Clause, not Sixth Amendment).

In accordance with this principle, this Court has consistently held that a jury trial for a petty offense is not within the scope of the constitutional right precisely because it was not within the scope of the common law right. See *Schick* v. *United States*, 195 U. S. 65, 69-70 (1904).

In only one type of case has this Court found that a defendant was constitutionally entitled to have a jury determine a question which judges determined at common law. *Bloom* v. *Illinois*, 391 U. S. 194, 198-200 (1968) extended the constitutional guaranty of jury trial to criminal contempt cases where the punishment exceeded the petty offense level, despite a long line of contrary authority. See *id.*, at 195-196.

Such a departure could only be justified by compelling reasons, and the reasons are plain enough. There is great potential for tyranny in a proceeding initiated, prosecuted, and tried by a single judge. When all this is done by the same judge whose authority was defied, it comes perilously close to the judge having an interest in the action. Cf. *Tumey* v. *Ohio*, 273 U. S. 510, 535 (1927); see also Advisory Committee Note to Federal Rule of Criminal Procedure 42(b), para. 4.

These dangers have long been apparent. Blackstone noted that the manner of trying contempts was "not agreeable to the genius of the common law in any other instance." 4 W. Blackstone, Commentaries 284 (1st ed. 1769). In *Bushell's Case*, 124 Eng. Rep. 1006, 1010 (CP 1670), the potential for abuse in a contempt proceeding was held to justify the extraordinary remedy of *de novo* review on habeas corpus, a proceeding

completely unavailable to persons accused of felony or treason, who had the benefit of trial by jury.

There are no dangers of comparable weight to justify overturning traditional practice in the present case with a blanket constitutional mandate. There may be particular false statement laws where materiality is properly considered a factual question for the jury. In the absence of an express statutory directive either way, this may be a proper decision for courts to make. The problem with the opinion below is its implication that the result is constitutionally required, leaving contrary state practices in doubt. See App. to Pet. for Cert. 9a-10a, n. 2.

To follow the course of *Bloom* and hold that, throughout the Nation, juries must now decide questions that judges have decided for centuries, there should be a showing that something is fundamentally unjust about having judges make these decisions. Yet the entire institution of jury trial was not considered "fundamental to ordered liberty" when that was the test of incorporation in the Fourteenth Amendment. See *Duncan* v. *Louisiana*, 391 U. S. 145, 185 (1968) (Harlan, J., dissenting). Close on the heels of the *Winship* decision, this Court rejected a requirement for juries in juvenile cases, in part because it did not believe that juries would actually be better fact-finders. *McKeiver* v. *Pennsylvania*, 403 U. S. 528, 547 (1971) (plurality); *id.*, at 551 (White, J., concurring).

The court below says that juries are capable of making materiality determinations. App. to Pet. for Cert. 14a. That may well be true, but it does not follow that judges are not capable or that determination by judges is unfair. Compelling reasons for overthrowing a centuries-old practice have not been shown.

B. Sullivan v. Louisiana.

The court below placed great reliance on *Sullivan* v. *Louisiana*, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993), but that case does not alter the scope of the right to jury trial. *Sullivan* involved a clear case of *Winship* error. The burden of proof instruction given to the jury was not "reasonable doubt" as that term is generally understood in American jurisprudence. The

doubt at issue in Sullivan's trial was the quintessential question of fact: who did it? *Id.*, at 187, 113 S. Ct., at 2080.

The Sixth Amendment only entered the case on the question of harmless error analysis. The Court held that an appellate court cannot say that the jury would have found the facts proven by the required standard had they been so instructed, for then the defendant would have been found guilty by the wrong entity. *Id.*, at 190, 113 S. Ct., at 2082. *Sullivan* says nothing about which elements must be submitted to the jury *at trial*, because the elements in question in that case were clearly for the jury.

C. Sinclair as Precedent.

The majority opinion in the Court of Appeals acknowledged that *Sinclair* v. *United States*, 279 U. S. 263 (1929) is a precedent of a higher court on point, and then proceeded to decide whether this precedent survives later cases, which are not on point. App. to Pet. for Cert. 6a. There are two problems with this approach, one involving the hierarchy of courts, the other involving the nature of precedent.

The first point is straightforward. "Needless to say, only this Court may overrule one of its precedents. Until that occurs, [*Sinclair*] is the law, and the decision below cannot be reconciled with it." *Thurston Motor Lines, Inc.* v. *Jordan K. Rand Ltd.*, 460 U. S. 533, 535 (1983).

The second point is equally fundamental. "We take it to be a sound principle, that no proposition of law can be said to be overruled by a court, which was not in the mind of that court when the decision was made." *Woodruff* v. *Parham*, 8 Wall. (75 U. S.) 123, 138 (1869). *Sinclair* was a case about who decides which issues at trial, the judge or the jury. It could only be overruled in a case where that question was "in the mind of the court," not merely by facial inconsistency with general statements in cases dealing with other issues.

Winship was a case about the burden of proof employed by a judge sitting without a jury. Identity of the decision maker was not at all a factor in the case. *Sullivan* is not on point for the reasons discussed *ante*, at 15-16. *Cabana* v. *Bullock*, 474 U. S. 376, 384-385 (1986) involved a finding of fact which was not an element of the offense at all, and thus passing mention of the

requirement that juries find the elements is a pure example of an *obiter dictum*, and a disapproved dictum at that. See *Pope* v. *Illinois*, 481 U. S. 497, 503, n. 7 (1987).

By paying too much attention to dicta, the Court of Appeals majority fell into an old, well-known trap. As Chief Justice Marshall noted long ago,

> "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." *Cohens* v. *Virginia*, 6 Wheat. (19 U. S.) 264, 399-400 (1821).

That is why "[i]t is to the holdings of our cases, rather than their dicta, that we must attend . . . ." *Kokkonen* v. *Guardian Life Ins. Co. of America*, 128 L. Ed. 2d 391, 396, 114 S. Ct. 1673, 1676 (1994). The possibility that there may remain some elements to be determined by the trial judge in a jury trial was not "completely investigated" (or, indeed, investigated at all) by the cases cited by the Court of Appeals, because that question was not presented in any of them. It was not "in the mind of the court" in any of these cases, and a precedent on that point cannot have been overruled by them.

Sinclair was a federal case. The right to jury trial in federal courts was a constitutional right the day those courts were created. U. S. Const., Art. III, § 2, cl. 3. The application of that rule to the states can hardly alter *Sinclair*'s status as precedent. Similarly, proof beyond a reasonable doubt was a well-known requirement at the time of *Sinclair*, see *In re Winship*, 397 U. S. 358, 362 (1970) and cases cited, so the subsequent constitutionalization of that requirement made no change in the rules governing federal courts. If the *Sinclair* rule coexisted with both rights in 1929, no change in the law since then prevents them from coexisting now.

Amicus CJLF takes no position on whether this Court should follow *Sinclair* or overrule it under its general supervisory power over federal courts. What we do object to is the wresting of yet one more decision from the realm of legislative control and state-by-state development in the absence of any compelling reason for such a step. The federalization and constitutionalization of criminal procedure have gone too far already. In this case, at least, they should go no further.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

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Respectfully submitted,

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